SUPREME COURT, U.S.
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NO. 94-424

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD X. KNIPE, GLENN A. VALENTINE
and BERNARD C. FORD,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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SEPTEMBER, 1994

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, Petitioners submit this supplemental brief.

We call the Court's attention to the following significant case which came to Petitioners' attention after their petition for a writ of certiorari was filed: *Mace v. Skinner*, No.92-17014, slip op. 10487 (9th Cir. Sept. 6, 1994) (WESTLAW 1994, WL476730). *Mace* is directly on point to the basic jurisdictional issue before this Court.

In a lengthy and carefully reasoned opinion, the Ninth Circuit held that even though 49 U.S.C. app. § 1486 provides that courts of appeals shall have jurisdiction of Federal Aviation Administration and National Transportation Safety Board orders this did not deprive a United States district court of the subject matter jurisdiction it would otherwise have in a so-called *Bivens* action, *Bivens v. Six*

Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

The same logic used in *Mace* applies to the instant Federal Tort Claims Act ("FTCA") action. "[M]ace's claims . . . are not based on the merits of his individual situation, but constitute a broad challenge to the allegedly unconstitutional FAA practices. [footnote omitted.]" *Mace v. Skinner, supra*, slip op. at 10498; *cf Beins v. United States*, 695 F.2d 592 (D.C.Cir. 1982). The opinion relies heavily on this Court's landmark decision in *McCarthy v. Madigan*, 503 U.S. ___, 117 L.Ed.2d 291.

Mace is one of a series of both *Bivens* and FTCA actions brought by petitioners' counsel for various airmen. It raises many issues identical to those raised by the complaint here. Thus the direct conflict between the decision of the Second Circuit in the instant case and the District of Columbia Circuit's decision in *Beins*,

supra, is made razor sharp by the Ninth Circuit's decision on identical issues concerning the validity of FAA license penalties and enforcement procedures.

Mace also points out that the decision does not prevent in district court a Fed.R.Civ.P.12(b)(6) motion to dismiss for failure to state a claim or arguments concerning absolute or qualified immunity. *Mace v. Skinner, supra*, slip op. at 10499 n. 6.

We note the government has waived its right to file a response, unless requested. The issue here is of great importance to one million airmen. We would hope the Court sees fit to request a response.

Respectfully submitted,

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